84-1613

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No.

In the

United States Supreme Court

October Term, 1984

ROLAND G. HUEBNER, WILLIAM HUEBNER, and PETENWELL POTATO FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

Petition for Writ of Certiorari and Appendix

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QUESTION PRESENTED

In performing certain farming activities, such as the maintenance and construction of irrigation ditches, must farmers obtain a permit from the U.S. Army Corps of Engineers, as required by the Clean Water Act of 1977, 33 U.S.C. § 1344(a), or are they excused from the permit requirement under the agricultural exemptions provided in Section 1344(f) of the Act?

LIST OF PARTIES

The names of all parties to the proceeding in the U.S. Court of Appeals, Seventh Circuit, are contained in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals, Seventh Circuit, reported at 752 F.2d 1235 (7th Cir. 1985), is reproduced at Appendix A. The opinions of the U.S. District Court for the Western District of Wisconsin, not reported, are reproduced at Appendix C.

JURISDICTION

The judgment of the U.S. Court of Appeals, Seventh Circuit, was entered on January 11, 1985, and is reproduced at Appendix B. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves the Clean Water Act of 1977 ("CWA"), 33 U.S.C. §§ 1251 *et seq.*

33 U.S.C. § 1311(a) prohibits the discharge of pollutants into wetlands: "Except as in compliance with this section and section . . . 1344 of this title, the discharge of any pollutant by

any person shall be unlawful." 33 U.S.C. § 1362(6) includes dredged spoil in the definition of pollutant: "The term 'pollutant' means dredged spoil . . ."

33 U.S.C. § 1344 establishes the authority for the Section 404 permit program. It provides in relevant part:

> (a) The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.
>
> * * *
>
> (d) The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.
>
> * * *
>
> (f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material —
>
> > (A) from normal farming . . . activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
> >
> > * * *
> >
> > (C) for the purpose of construction or maintenance of farm . . . irrigation ditches, or the maintenance of drainage ditches;
> >
> > * * *
> >
> > (E) for the purpose of construction or maintenance of farm roads or forest roads . . . where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
>
> * * *

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title . . .

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

STATEMENT OF THE CASE

The petitioners, Roland G. Huebner, William Huebner and Petenwell Potato Farms ("Huebners"), in 1977 purchased 5,000 acres of land in Jackson County, Wisconsin, which had been used for agricultural purposes since 1900. They continued to farm a 57-acre cranberry bed and cultivated some other crops on portions of this property known as "Bear Bluff Farms."

In 1977 the U.S. Army Corps of Engineers ("Corps") issued a cease-and-desist order and filed a complaint in the U.S. District Court for the Western District of Wisconsin, alleging that the Huebners' ditching activities constituted a permitless "discharge of dredged or fill material" into a wetland, in violation of the CWA.

The Huebners and the Corps resolved their dispute by entering into a consent decree which was approved by the district court on June 5, 1978. Paragraph 1 of the consent decree enjoined the Huebners "from any and all operations which constitute the discharge of dredged or fill material into waters of the United States, including wetlands . . . except as in accordance with a Department of Army permit and other lawful authority."

In conjunction with their cranberry bed and croplands at Bear Bluff Farms, the Huebners operated an irrigation system involving 30 miles of irrigation ditches and numerous water control structures. From 1977 to November, 1982, the Huebners

cleaned and maintained the irrigation ditches which had existed prior to their purchase of the property, and they constructed and maintained new irrigation ditches. They enlarged their 57-acre cranberry bed in 1979-80 by adding 10 adjacent acres, of which 5 acres constituted wetlands as defined under the CWA. The Huebners did not obtain Section 404 permits for these activities.

The ongoing cleaning and construction of irrigation ditches was performed according to the customary farming practice of depositing the material cleaned from the irrigation ditch onto a spoil bank adjacent to the ditch. The top of the spoil bank is then leveled and the bank used as a farm road to permit access to the water control structures throughout the irrigation system and in conducting farming activity. Such farm roads are vital to the use and maintenance of the irrigation system.

On November 17, 1982, the Corps initiated a contempt-of-court proceeding, contending that the Huebners had violated the consent decree in that they failed to obtain a Section 404 permit prior to cleaning and constructing ditches, constructing farm roads, and expanding the cranberry bed. The district court derived jurisdiction from 28 U.S.C. § 1331; 33 U.S.C. §§ 1311, 1342 and 1344; and 18 U.S.C. § 401.

The district court determined that the ditching activity required a Section 404 permit on the following basis:

> I interpret this language [Section 1344(f)(1)(C), the irrigation ditch exemption] as exempting only those deposits [of dredged material] which go to make up a dike that is an integral part of the ditch. If the resulting spoil bank is merely incidental to construction; that is, it is created simply because it is easier and cheaper to dump the spoil on the site than to haul it to an upland area for deposit, the purpose is not construction, but convenience. If the buildup of the spoil bank is not reasonably necessary to the purposes of irrigation, the spoil bank is no different from any other dike in a wetlands area and is exempt only if it qualifies under another exception. (Appendix C, p. 18)

The district court also determined that the expansion of the cranberry bed required a Section 404 permit because it constituted an activity which brought the area into a new use, contrary to Section 1344(f)(2). (Appendix C, pp. 24-25)

The court of appeals affirmed the "district court's narrow interpretation of the agricultural exemptions" (Appendix A, p. 11) and the determination that these activities required Section 404 permits (Appendix A, pp. 13-15).

REASONS FOR NOTING PROBABLE JURISDICTION

This Court should take jurisdiction of this case because it raises an important question of federal law which has not been, but should be, settled by this Court. Sup. Ct. R. 17.1(c). The lower courts' interpretation and application of the 33 U.S.C. § 1344(f) exemptions of certain farming activities from the Section 404 Corps permit requirement presents a question of first impression in the federal judicial system. This issue arises in the context of a contempt proceeding, and the court of appeals stated that the issue of ". . . whether the Huebners' permitless activities violated the terms of the 1978 consent decree hinge[s] on the court's interpretation of the scope of Section 1344(f)(1)'s exemptions." (Appendix A, p. 8)

The court of appeals, affirming the district court, has imposed a highly restrictive interpretation upon the agricultural exemptions of Section 1344(f)(1) by its narrow reading of Section 1344 (f)(2). The court's imposition of its reading of 1344(f)(2) upon the exemptions of 1344(f)(1) totally emasculates the agricultural exemptions. The lower courts' interpretration of the phrase "bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced" in essence precludes application of the agricultural exemptions to many important, normal, day-to-day farming activities.

The decision of the court of appeals presents an important question of statutory interpretation and administration of the CWA, particularly the Section 404 permit requirement, as it relates to the entire agricultural community which operates in or near wetlands. This is a matter of national significance concerning which this Court must be the final arbiter.

There are tens of thousands of farming operations which rely upon the agricultural exemptions in their ongoing activities. The court of appeals' interpretation of these exemptions establishes a judicial precedent which seriously jeopardizes farmers' ability to rely upon these exemptions and produces confusion within the national farming community concerning how the Section 404 permit requirements apply to normal farming activities.

Both courts below have held that the deposit of material cleaned from an existing ditch or dredged in the construction of a new ditch and deposited in the wetland as a spoil bank adjacent to the ditch is not exempt unless the spoil bank constitutes "an integral part of the ditch" itself. However, a spoil bank is not a part of the ditch. Under normal farming operations, the waste material produced when a ditch is created or maintained is sidecast next to the ditch; it is not an actual part of the ditch. The courts' interpretation of Section 1344(f) is without basis in fact or law, and has the effect of eliminating agricultural ditching from the activities which Congress intended to be exempt from the Section 404 permit requirement.

Similarly, the courts' determination that the Huebners required a Section 404 permit to include 5 acres of wetlands in the expansion of an existing 57-acre cranberry bed constitutes an erroneously restrictive interpretation of 33 U.S.C. § 1344(f) and is contrary to the intent of Congress. The court determined that this activity constituted bringing an area into a new use and impaired the circulation or reach of navigable waters under Section 1344(f)(2), thus requiring a Section 404 permit. Such a restrictive interpretation of Section 1344(f) has the effect of rendering numerous activities normally performed in an ongoing farming operation subject to the requirement of a Section 404 permit and defeats the purpose of Congress in establishing these exemptions.

The court of appeals bases its interpretation of the agricultural exemptions upon an incorrect reading of the legislative history of the 1977 amendments to the CWA. The court of appeals' narrow interpretation of these exemptions has the effect of rendering the exemptions a nullity in normal, day-to-day farming activities. Considering the expansive definition of wetlands under the CWA, such an interpretation subjects the farming community to the burdensome and time-consuming process of obtaining Section 404 permits for routine farming activities — a requirement which Congress intended to avoid in enacting the specific agricultural exemptions set forth in Section 1344(f).

CONCLUSION

The decision of the court of appeals interpreting the agricultural exemptions of the Section 404 permit requirement denies rights granted by Congress to the extensive farming community within that circuit's jurisdiction and establishes precedence in resolving a question of first impression which has national significance. Because of the importance of the court's statutory interpretation and the pervasive impact of the Section 404 permit program upon the national farming community, review by this Court is warranted.

Dated this 10th day of April, 1985.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 83-3140

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROLAND G. HUEBNER, WILLIAM HUEBNER, and PETENWELL POTATO FARMS,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 77 C 407—**Barbara B. Crabb**, *Judge.*

ARGUED SEPTEMBER 12, 1984—DECIDED JANUARY 11, 1985

Before BAUER, *Circuit Judge*, PELL, *Senior Circuit Judge*, and DUPREE, *Senior District Judge*. *

BAUER, *Circuit Judge*. In 1978, pursuant to litigation commenced under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* (1978), by the United States Army Corps of Engineers (Corps), defendants Roland G. Huebner, William Huebner and the Petenwell Potato Farms (Huebners), entered into a consent decree with the Corps regarding the maintenance of the wetlands on their property. In 1983, following a six-day hearing, the district court found the Huebners in contempt of the 1978 order and ordered them to comply with a restoration plan

* Honorable Franklin T. Dupree, Jr., Senior District Judge for the Eastern District of North Carolina, is sitting by designation.

developed by the Corps. The Huebners appeal the lower court's contempt order and restoration plan. We affirm the district court's finding of contempt, reverse the district court's restoration order and remand with instructions.

I. FACTS

In 1977, the Huebners, owners of a 4,000 acre vegetable farm, acquired "Bear Bluff Farms," a 5,000 acre property in Jackson County, Wisconsin, the largest continuous area of wetlands in Wisconsin. The wetlands on Bear Bluff provide a habitat for wetland foliage and wildlife, and moderate the flow of water to surrounding wildlife refuges by absorbing excess stream flow in periods of high water and releasing water during the dry season.[1]

Since the turn of the century Bear Bluff has been used intermittently for a variety of agricultural purposes, including the production of dryland crops, such as corn and oats. For the twenty years preceding the Huebners' ownership, however, only cranberries have been grown on the land. Cranberry cultivation requires a constant supply of water to protect against frost, to flood the berries for harvesting, to mulch them in the winter and to irrigate

[1] The Wisconsin wetlands are characterized by a layer of sphagnum moss overlaying a varying depth of Dawson peat and Palms muck which rest on gray siliceas sand. Generally the area is comprised of large exposures of sedge meadows, interspersed with shrub swamp, occasional upland areas and bogs. The area is generally vegetated with black spruce and heath species. Beggar-tick, smartweeds and crabgrass grow near the reservoirs, while coontail, pondweed and grass grow in the ditches. Sandhill cranes, sharptailed grouse, Canadian geese, and raptors, such as marsh hawks, roughlegged hawks and short-eared owls, feed and nest in the wetlands. White tailed deer and other furbearing mammals also use the wetlands for fawning and browsing. Schools of bullheads travel the ditches. R. 34, 35 & 49.

them in the growing season.[2] When the Huebners acquired Bear Bluff, the farm included three cranberry beds, including a fifty-seven acre cranberry bed called the Staege bed on the southern part of the property. The Staege bed was served by three diked reservoirs: the Hunter's Peak, Juliane and Unnamed Reservoirs. The record indicates that the Huebners intended to expand the cranberry operations of Bear Bluff Farms and to use a portion of the farm for growing vegetables and other upland crops.

In 1977, the Huebners began to plow sections of the farm to clear out existing ditches and dig new ones. On September 2, 1977, the St. Paul District of the United States Army Crops of Engineers issued several cease and desist orders to the Huebners, alleging that their ditching activities constituted a permitless "discharge of dredged or fill material" into the Bear Bluff wetlands in violation of section 301 of the Federal Water Pollution Control Act, 33 U.S.C. § 1311 (1976), renamed the "Clean Water Act" in 1977.[3] On November 10, 1977 the Corps filed a complaint in

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[2] The Amicus Curiae brief of the Wisconsin Cranberry Growers Association indicates that Wisconsin leads the nation in the production of cranberries, which grow well in the inland wetlands of that state. Of the 110,000 wetlands acres owned by Wisconsin cranberry farmers, only 6% of the total acreage is developed into beds where cranberry plants are grown. The remaining 94% of acreage contains each cranberry bog's water control system through which water is supplied to the beds by means of reservoirs, dikes, dams, ditches, canals, bulkheads, pumps, and sprinklers.

[3] See S. REP. 1236, 92nd Cong. 2d Sess. 99 (1972), U.S. CODE CONG. & ADMIN. NEWS 1972, p. 3668, *reprinted in* Environmental Policy Division of the Congressional Reference Service, 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 282 (Comm. Print 1973) (hereinafter "LEGISLATIVE HISTORY"). In 1977, Congress approved the shortened "Clean Water Act" title. H. REP. No. 830, 95th Cong. 1st Sess. 1 (1977), U.S. CODE CONG. & ADMIN. NEWS 1977, p. 4326, *reprinted in* 3 LEGISLATIVE HISTORY, at 185.

the district court seeking a permanent injunction and a financial penalty against the Huebners. In June, 1978 the parties settled the action by entering into a consent decree approved by District Judge James E. Doyle.

Paragraphs 1 and 2 of the ten paragraph order are most significant for purposes of this appeal. Paragraph 1 permanently enjoins the Huebners "from any and all operations which constitute the discharge of dredged or fill material into waters of the United States, including wetlands within the . . . described area of Jackson County, Wisconsin . . . except as in accordance with a Department of Army permit and other lawful authority." Paragraph 2 requires that the Huebners notify the Corps "in writing, twenty (20) days prior to the commencement of any discharge of dredged or fill material on any portion or portions of the land described in paragraph 1," so that the Corps could "notify the defendants, in writing, of the need for the Department of Army permit as to the stated sites."

Paragraphs 4, 5 and 7 relate principally to the restoration and continued maintenance of wetlands in the Hunters Peak, Juleane and Unnamed Reservoirs. Paragraphs 4 and 5 describe certain restoration and maintenance activities to be performed by the Huebners on culverts, embankments and ditches, which activities would restore the ditches and dikes to the dimensions existing prior to the dredging that prompted the order. Paragraph 7 requires the Huebners to "maintain and operate the control structures and reservoirs referred to in paragraph 4 above in a safe manner, for maximum drainage control, and to protect the integrity of the dikes and the structures therein."[4]

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[4] Paragraph 6 requires that the mandates of Paragraph 4 be completed by July 15, 1978. Paragraph 3 imposes a one thousand dollar fine on the Huebners. Paragraphs 8, 9 and 10 order the Huebners not to apply for any after the fact permits, to afford Corps personnel access to their premises and to bear their own costs in the case.

The Huebners complied with the immediate restoration provisions of the consent order. On November 16, 1982, however, the government moved for an order to show cause why the Huebners should not be held in contempt for violating the 1978 order. The government, through its affidavits, charged that dredged material had been placed on the sides of Beaver Creek and was sliding into the adjacent wetlands, that a portion of the wetland had been plowed and furrowed by a marsh plow, and that the dikes of the Hunter's Peak, Julane and Unnamed Reservoirs had been leveled and scraped by a bulldozer without notice to the Corps and without any Corps permit allowing such activity. The Huebners had planted barley in a plowed portion of the Hunter's Peak, and stated that they intended to plant corn.[5]

The district court adopted the government's "proposed finding of fact" as "preliminary findings of fact" on January 17, 1983, and held evidentiary hearings for six days, in April and May of 1983. On August 4, 1983 the district court entered an order holding the Huebners in civil contempt of the court's 1978 consent order on the grounds that the government had proved by "clear and convincing evidence" that the Huebners had made permitless discharges of dredged and fill material into the Bear Bluff wetlands in violation of the 1978 order. The Huebners allege that they are not in contempt of the district court's 1978 order because the activities in which they engaged in on their land did not require a Corps permit. They allege that the district court erred in its interpretation of the agricultural exemptions of the CWA, as relevant to the 1978 consent order, in determining

[5] The Huebners stated that they needed an immediate cash crop to pay for the equipment costs of their dredge and fill activities. R. 51. Cranberries take several years to become fully productive.

when permits are required. The Huebners also argue that the district court denied them due process by improperly excluding certain evidence during the contempt hearing, and that the court abused its discretion in refusing to amend the 1983 restoration plan.

II. THE CLEAN WATER ACT

Congress enacted the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1978). The goal of the CWA is to eliminate by 1985 "the discharge of pollutants into navigable waters." 33 U.S.C. § 1251(a)(1) (1978).

The "navigable waters" subject to Corps authority under the Act include wetlands, which have been defined as

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(a)(7)(c) (1983). The term "navigable waters" has been given "the broadest constitutional interpretation," 1 LEGISLATIVE HISTORY at 178 (Senate Consideration of the Conference Report on S. 2770, Oct. 4, 1972), in recognition of the fact that

> [t]he regulation of activities that cause water pollution . . . must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of [a] part of the aquatic system . . . will affect the water quality of the other waters within that aquatic system.

42 Fed. Reg. 37,128 (1977). *See also* 2 LEGISLATIVE

HISTORY at 1495 (Report of Senate Committee on Public Works).[6]

The CWA defines "pollutant" to include "dredged soil ... rock, sand, [and] cellar dirt," 33 U.S.C. § 1362(6) (1978), and establishes a permit system to control discharges of dredged material. Section 1344 of the Act authorizes the Secretary of the Army to act through the Corps to issue such permits under certain conditions and procedures.[7] The permit process is "[t]he cornerstone of the . . . scheme for cleaning up the nation's waters." *United States Steel Corp. v. Train*, 556 F.2d 822, 829 (7th Cir. 1977). *See also Mobil Oil Corp. v. United States E.P.A.*, 716 F.2d 1187, 1189 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984); *Citizens for a Better Environment v. Environmental Protection Agency*, 596 F.2d 720, 721-22 (7th Cir. 1979); *United States v. Byrd*, 609 F.2d 1204, 1206 (7th Cir. 1979); *American Meat Institute v. Environmental Protection Agency*, 526 F.2d 442, 444-45 (7th Cir. 1975).

The Huebners did not challenge the authority of the Corps to regulate parts of Bear Bluff Farms as wetlands in the district court, but argued that their activities were exempt from the CWA's permit process under Section 1344(f)(1). The district court held that the phrase "dis-

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[6] Under this definition, "wetlands" have been held to include artificially created canals, *Weiszmann v. District Engineer*, 526 F.2d 1302 (5th Cir. 1976); normally dry arroyos, *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975); and mangrove wetlands, *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).

[7] This delegation of authority to the Corps recognizes the Army Corps of Engineers' historic role in preserving the navigability of the waterways of the United States. *See generally* Caplin, *Is Congress Protecting our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 U. MIAMI L. REV. 445, 448 (1977); Ablard & O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51, 54-58 (1976).

charge of dredged or fill material" in the 1978 consent order incorporated the legal meaning of those terms under the CWA and therefore the question of whether the Huebners' permitless activities violated the terms of the 1978 consent decree hinged on the court's interpretation of the scope of Section 1344(f)(1)'s exemptions. The district court held that "[i]t is clear that the amendments that created the subsection (f) exceptions on which defendants rely were not intended to exempt all farming operations from the permit requirements, but only those whose effect upon wetlands or other waters was so minimal as not to warrant federal review and supervision." R. 118, Order at 17-18. The court then analyzed the defendants' actions in light of the purposes of the Clean Water Act, the intent of Congress in enacting the farming exceptions, and the terms of the 1978 order. Our review of the legislative history confirms the conclusion reached by the lower court.

Section 1344(f)(1) provides exemptions from the permit process for discharges into wetlands caused by agricultural activities, such as plowing and the maintenance of dikes, ponds, and farm roads.[8] The exceptions of Section

[8] Section 1344(f)(1) provides exemptions for discharges:

> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(Footnote continued on following page)

1344(f)(1) are subject to section 1344(f)(2), however, which provides that discharges are not exempt from the permit process if they bring "an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced."

Our review of the legislative history of the agricultural exemptions convinces us that because of the significance of inland wetlands, which make up eighty-five percent of the nation's wetlands,[9] Congress intended that Section 1344(f)(1) exempt from the permit process only "narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively [and

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[8] *continued*

> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches; [and] . . .
>
> (E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

[9] Congress recognized that the protection of the waters of the United States required an "organic" concept of the national aquatic system and attempted to enact in the Clean Water Act a permit system with "no gaps" in its protective measures. 4 LEGISLATIVE HISTORY 907 (statement of Sen. Hart) (excerpts from debate on the Bentsen Amendment); *id.* at 897 (statement of Sen. Randolph during Senate Debate on S. 1952, August 4, 1977). Congress purposefully included nonnavigable inland

(Footnote continued on following page)

which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body." 3 LEGISLATIVE HISTORY at 420 (statement of Rep. Harsha, member of the conference committee, during House debates). *See also id.* at 474. The Fifth Circuit also has held that § 1344(f)(1) was designed to be a "narrow exemption." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 n.44 (5th Cir. 1983).

Recognizing that "there has been widespread concern that many activities that are normally considered routine would be prohibited or made extremely difficult because of the complex regulatory procedures," 4 LEGISLATIVE HISTORY 897 (statement of Sen. Randolph), Congress enacted in the 1977 amendments a delicate balance of exceptions that protected wetlands while permitting routine activities to go on unimpeded.

> The drainages exemption is very clearly intended to put to rest, once and for all, the fears that permits are

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[9] *continued*

wetlands in the definition of navigable waters because of their importance in the chain of travel of toxic pollutants. 4 LEGISLATIVE HISTORY 928 (statement Sen. Muskie). "Routine farming operations release substantial quantities of contaminants including sediment, salt, nutrients, pesticides, organic materials and pathogens into our waterways. It has been estimated, for instance, by the U.S. Soil Conservation Service, that cropland is responsible for 50 percent of the total sediment entering inland waterways." 4 LEGISLATIVE HISTORY at 1062 (statement of Sen. Muskie). President Carter estimated that inland wetlands were worth "$50,000 per acre," but noted that "our economic system does not transfer this wealth to individual owners. Therefore, wetlands will continue to be destroyed until the government takes steps to protect them." *Id.* at 1251 (statement of President Jimmy Carter). Other proponents of the amendment noted that wetlands were being destroyed at the rate of 300,000 acres a year. 4 LEGISLATIVE HISTORY 882 (statement of Sen. Stafford during Senate Debate on S. 1952, August 4, 1977). The need for land for residential purposes has prompted the conversion of many wetlands. 31 U. MIAMI L. REV. 445, 491 (1977).

> required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainage. Permits are required only where ditches or channels are dredged in a swamp, marsh, bog or other truly aquatic area.

4 LEGISLATIVE HISTORY 1042 (statement of Sen. Muskie).[10] We therefore affirm the district court's narrow interpretation of the agricultural exemptions and its incorporation of the purpose of those exemptions into the finding of contempt against the Huebners for violation of the 1978 consent decree.

III. FINDINGS AS TO SPECIFIC ACTIVITIES ON BEAR BLUFF FARMS

In civil contempt proceedings for violations of a consent decree, plaintiffs must prove the violations by clear and convincing evidence in the trial court. *Squillacote v. Local 248, Meat & Allied Food Wkrs.*, 534 F.2d 735, 747 (7th Cir. 1976). The court's factual determinations are accorded great weight on appeal when they depend on credibility determinations based on the demeanor of witnesses at trial. *Cf. NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). Moreover, the remedy chosen by the trial court in a contempt proceeding on a consent decree is "discretionary in character and is not to be reversed

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[10] Answering Senator Dole's question as to whether a permit would be necessary if one or two farmers got together and dug small ditches in order to drain a low lying area to improve the production of crops, Senator Muskie responded that:

> [T]he Corps definition requires a prevalence of aquatic vegetation and is intended to describe only the true swamps and marshes that are part of the aquatic ecosystem. The type of drainage [described by Senator Dole] could be performed without discharging dredged or fill material in water or would occur in areas that are not true marshes or swamps intended to be protected by section 404.

4 LEGISLATIVE HISTORY 1042-43.

except for abuse of such discretion or unless clearly erroneous." *Walaschek & Associates, Inc. v. Crow*, 733 F.2d 51, 53 (7th Cir. 1984), *quoting Jewel Tea Co. v. Kraus*, 204 F.2d 549, 551 (7th Cir. 1953). Our review of the lower court's findings of fact and conclusions of law as to the particular challenged activities is guided therefore by these standards.

A. Plowing the Reservoirs

The lower court found that the Huebners used a marsh plow to plow and remove wetland vegetation from the three reservoirs at sites 10, 11 and 12, and leveled the dikes in these reservoirs. The court found that the Huebners plowed the reservoirs to decrease the capacity of the soil to store water in preparation for the immediate planting of barley and for the future planting of corn and other dryland crops. The court held that in doing so the Huebners failed "to protect the integrity of the dikes" and to guarantee "maximum drainage control" in direct violation of paragraph 7 of the 1978 consent decree.

The Huebners do not deny these activities but argue that they were not required to notify the Corps or obtain a permit for the plowing of the reservoirs because the "nonfunctional and nonproductive" nature of the reservoirs required that they cease to be used as reservoirs. The Huebners claim that their activity will make the reservoirs "more effective land," and argue on appeal that "the so-called reservoirs had been cropped for decades before the unsuccessful attempt to convert this land into reservoirs in 1956." The Huebners stated purpose, however, is in direct opposition not only to the purposes of the Clean Water Act, but, more importantly, to the terms of the consent decree, which required a return to the status of the land as it had existed prior to the discharge activities which had initially prompted the 1978 order. We therefore affirm the court's finding that the Huebners were in violation of the 1978 order when they plowed the reservoirs.

B. Cleaning, Deepening and Digging Ditches

In conjunction with the plowing of the reservoirs, the district court found that the Huebners had used backhoes to clean and deepen existing ditches at sites 1, 2 and 14 and used a dragline to excavate an approximately 400 foot long new ditch at site 3. The court found that the result of the deepening activities at sites 2 and 14 was to drain the reservoirs. The court also found that at sites 1, 2, 3 and 14 the Huebners had sidecast materials onto the wetlands, used bulldozers to spread the discharge over several acres, and formed the materials into farm roads which were broader than necessary according to best management practices.

The Huebners argue that the evidence showed that their ditches were used solely for irrigation purposes, and therefore they were exempt from the permit procedure under Section 1344(f)(1)(c), which exempts discharges related to the "construction or maintenance of irrigation ditches." The Huebners also argued that the water level in the ditches had been raised, indicating that the groundwater level surrounding the ditch was higher than it had been prior to the 1978 decree. The Huebners argued that the evidence of a higher groundwater level showed a compliance with the purposes of the 1978 order.

The district court rejected the Huebners' focus on ditch water level and looked instead to the results of Huebners' dredging activity as it affected the surrounding wetlands. We think this interpretation of the purposes of the 1978 consent order was proper. We think the government succintly stated the fallacy of the Huebners' argument at oral argument when counsel stated that "the Clean Water Act is not a Full Ditch Act:" the water level of the ditches is not the key to compliance with the purposes of the 1978 order.

The district court correctly reasoned that even if the ditches at issue were irrigation ditches, the restrictions of Section 1344(f)(2) still applied. Under Section

1344(f)(2), the discharge of dredged materials from the construction of irrigation ditches requires a permit where such discharges "bring an area of navigable waters into a use to which it was not previously subject and where the flow of the waters is impaired and their reach reduced." The district court reasoned that the sidecasting and spreading activity reduced the reach of the wetlands surrounding the ditches at issue. The court therefore concluded that the defendants had violated the 1978 order by not giving notice of such activity and by not obtaining a permit. We affirm the court's conclusion that the Huebners' ditching activity, whether it involved irrigation or drainage ditches, ran afoul of the provisions of Section 1344(f)(2). The Huebners' activity constitued a discharge of dredged material onto a wetland, thereby disturbing the reach of its waters. Such activity required notice and application for a permit under the 1978 consent decree.

C. Maintenance of Farm Roads

The district court found that at sites 1, 5, and 6 the Huebners bulldozed excess road fill into adjacent wetlands and maintained the roads at a greater width than necessary. The Huebners argued that discharges made in connection with the maintenance of farm roads are exempt from permit requirements under Section 1344(f)(1)(E). The court concluded, however, that the Huebners' bulldozing activities violated Section 1344(f)(1)(E)'s requirement that the "best management practices" be used in the maintenance of farm roads, and reasoned therefore that the Huebners should have given notice and obtained a permit if necessary before widening the roads. We find nothing clearly erroneous in the court's conclusion and affirm the lower court's ruling that Section 1344(f)(1)(E) exemptions for discharges made in the construction and maintenance of farm roads does not

apply to the Huebners' activities. The Huebners' failure to give notice and apply for a permit for these activities was a violation of the 1978 order.

D. Expansion of Cranberry Beds

The court below held that the Huebners' expansion of the Staege cranberry beds at site 9 without a permit violated both paragraphs 1 and 2 of the consent order because it found that the conversion of the adjacent wetlands into cranberry beds was a "use" of the wetlands to which they had not been previously subject, therefore requiring a permit under Section 1344(f)(2). 33 C.F.R. § 323.4(a)(1)(ii) provides:

> [a]n operation ceases to be established when the area on which it is conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

Relying on this definition, the district court found that since the Huebners had had to drain the surrounding area in order to expand the bed, this conversion brought it within the terms of the regulation. We affirm the court's ruling.

E. Scraping Activity

Finally, the district court found that the defendants used a bulldozer to move large mounds of dirt and level a 10 to 12 acre area at site 13 in violation of paragraphs 1 and 2, which prohibit discharges without a permit. The court reasoned that the scraping of materials from a wetland constitutes a discharge, because wetlands are defined by the presence of aquatic vegetation. *See* 33 C.F.R. § 323.2(a)(7)(c) (1983). Moreover, the regulations also provide that Section 1344(f)(1)'s exemption for plowing "does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any of area of the waters of the United States to

dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing." 33 C.F.R. § 323.4(D) (1983). *See also Avoyelles Sportmen's League v. Alexander*, 473 F. Supp. 525, 533 (W.D.La 1979), 715 F.2d 897 (5th Cir. 1983). We find nothing erroneous in the court's conclusion, and affirm the court's ruling that the Huebners violated the 1978 order by not giving notice and applying for a permit for this scraping activity.

IV. DUE PROCESS

The Huebners argue on appeal that they were denied due process by the district court in that the court excluded evidence on the prior interpretation of Section 1344's agricultural exemption, on the meaning of the phrase "maximum drainage control" used in paragraph 7 of the 1978 order, on their estoppel and selective enforcement claims, and on assorted other matters. Because we find little merit in the Huebners' due process arguments, we treat these matters summarily here.

A potential contemnor in a civil contempt proceeding must be afforded a "meaningful opportunity to present a defense." *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 782 n.2 (7th Cir. 1981). In this case the Huebners received that opportunity when the district court afforded them six full days of a trial-type hearing on the contempt charge, at which the Huebners were represented by counsel, presented testimony and documentary evidence totaling over a hundred pages, and cross-examined the government's witnesses. Moreover, the record indicates that the Huebners were permitted to introduce documents involving "official Corps policy as opposed to an interpretation merely by individual Corps officials," R. 108, at the remedy stage of the proceedings and that they, through their prior attorney, had agreed to these procedural ground rules prior to the hearing.

The court below also properly excluded evidence on the "intent and purpose" of the phrase "maximum drainage control." The scope of a consent decree must be interpreted within its four corners and not with reference to the specific "purposes" of the parties involved. *Commodities Futures*, 655 F.2d at 782. In the absence of genuine ambiguity of meaning, no evidence beyond the plain meaning of the terms themselves was required. We find nothing clearly erroneous in the district court's interpretation of "maximum drainage control" as meaning that the Huebners guaranteed the protection of the integrity of wetlands by agreeing not to drain off the water. *Cf. United States v. Greyhound Corporation*, 509 F.2d 529 (7th Cir. 1974) ("restore practices and traffic patterns" held not ambiguous). The district court therefore properly rejected the Huebners' contention that the phrase referred only to the seasonal moderation of the flow of water from the reservoirs by the raising and lowering of the dikes.

The Huebners' estoppel claim is supported neither by the facts, which indicate that they were permitted to present evidence on the estoppel claim at the hearings on the restoration plan, nor by their legal argument. The Supreme Court recently stated that "the Government may not be estopped on the same terms as any other litigant," reasoning that "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law." *Heckler v. Community Health Services of Crawford County*, 104 S. Ct. 2218, 2224, 2226 (1984). *See also Schweiker v. Hansen*, 450 U.S. 785 (1981). In *Heckler* the court held that before estoppel will apply against the government in its effort to enforce the law, the alleged estopping statements must be in writing and must be made by officials at a policy-making level. *Heckler*, 104 S. Ct. at 2227. *See also City of Alexandria v. United States*, 737 F.2d 1022, 1028 (Fed. Cir. 1984).

The court below found that while there had been extensive correspondence between the defendants and the

Corps, none of this correspondence contained misleading representations as to the permissibility of the Huebners' conduct which was found in violation of the consent decree. Furthermore, the court credited the affidavit of Corps personnel and found that although some oral statements may have been made indicating that certain activity did not require a permit, the Huebners continued to plow even after being subsequently informed that such plowing did require a permit. The record in this case clearly does not establish a case of estoppel against the government under the principles of *Heckler* and *Schweiker*.[11] We find nothing erroneous in the court's rejection of the Huebners' estoppel claim. *See also Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982).

V. RESTORATION PLAN

A lower court's remedy for civil contempt is reviewable only under the limited "abuse of discretion" standard. *Sportmark, Inc. v. Wolverine World Wide, Inc.*, 601 F.2d 313 (7th Cir. 1979). The court below exercised its discretion in ordering particular restoration activities to be performed by the Huebners after considering whether the plan: (1) is achievable as a practical matter; (2) confers maximum environmental benefits; and (3) bears an equitable relationship to the degree and kind of wrong. R. 137, Order at 1. *See United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976). Upon review we find one portion of the district court's order to have been an abuse of discretion. The majority of the court's order, however, was within the court's discretion.

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[11] While the record is clear that estoppel does not apply in this case, we take this opportunity to caution Corps personnel to be clear in their dealings with citizens pursuant to carrying out their duties under the Clean Water Act. The private owners of wetlands are rarely lawyers, and Corps personnel should therefore assist these citizens in complying with the law by being simple, direct and uncontradictory in their communications.

The district court's remedial order requiring the Huebners to maintain certain water levels and to conduct other restoration activities withstands our review under the abuse of discretion standard. The record presents sufficient evidence to support the practicability of the maintenance of specified water levels at the reservoirs and other locations. The district court relied heavily on assessments of the credibility of the experts who testified as to the practicability of the water level aspect of the plan, noting that the achievability of such levels was "not a matter of common sense." R. 137 at 4. We must accord great weight to lower courts' factual determinations when they depend on the assessment of a witness' credibility, *cf. NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983), and thus we affirm that portion of the district court's order.

The Huebners complain bitterly about the ordered destruction of their permitless ten-acre expansion of the Staege cranberry beds, alleging that the beds are worth $400,000 and that their destruction is neither "cost-effective nor environmentally warranted." We agree with the Huebners and find the district court's order to destroy the ten acre bed to have been an abuse of discretion. The district court found that the Huebners' cranberry bed expansion "would not achieve maximum environmental benefits for the land at issue," and that, given the nature of the Huebners' repeated violations, the destruction of this bed bore an equitable relationship to the harm to the land caused by the Huebners.

Expert testimony in the record indicates however, that cranberry beds are compatible with wetlands, although they do not perform the same water filtration and storage functions as an undisturbed wetland. The district court also noted that the Huebners might have been able to expand the Staege bed had they applied for an expansion permit in the first instance. R. 137 at 8. Moreover, evidence in the record reveals that some representatives of the Corps were cognizant of the Huebners'

expansion of the cranberry beds. While this Corps conduct was insufficient to meet the exacting requirements necessary for the government to be estopped from seeking a contempt citation against the Huebners, it should have been a factor to be given considerable weight by the trial court in fashioning a restoration order. Given this evidence, we think that it was an abuse of discretion for the district court to find that the destruction of the cranberry expansion bed bore an equitable relationship to the degree and kind of wrong committed by the Huebners. The Huebners did not follow the rules of the consent decree, admittedly, but it is a draconian exercise of judicial discretion to order undone a ten-acre expansion of cranberry beds which it took the Huebners several years to develop and which beds are not inherently incompatible with the surrounding wetlands. Therefore, we reverse the district court's remedial order and remand with instructions to strike that portion of the order decreeing the destruction of the ten-acre cranberry bed.

V. CONCLUSION

It must be emphasized that any perceived severity in the findings and the remedy of the district court which we affirm in part and reverse in part here were brought on the Huebners by their own failure to comply to the terms of the 1978 consent order into which they had voluntarily entered. While the Huebners and amicus, the Wisconsin Cranberry Growers Association, voice concern over the ability of cranberry farming to continue in Wisconsin should we affirm the district court's orders, we decline to be persuaded by these highly speculative prophecies of doom. The Huebners may continue to farm their land. The district court recognized in ordering the restoration plan that the Huebners may still plant corn on parts of their property. R. 137 at 3. The Huebners may continue to farm cranberries or other crops, as long as they comply with the terms of the 1978 order which requires notice and application for permits. Other cranberry farmers or owners of wetlands property are also not prohibited from making a productive use of their property; proper compliance with the permit process is all that is required under the Clean Water Act to ensure that the use of the nation's wetlands proceeds with care. In conclusion then, the district court's finding of contempt is affirmed and its remedial restoration order is reversed and remanded with instructions to the district court to strike that portion of the order ordering the destruction of the ten-acre cranberry bed.

AFFIRMED IN PART,
REVERSED AND REMANDED IN PART.

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Test

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—1-11-85—450

Opinion by Judge Bauer

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 11, 1985.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. WILBUR F. PELL, *Senior Circuit Judge*
Hon. FRANKLIN T. DUPREE, JR., *Senior District Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 83-3140
ROLAND G. HUEBNER,
WILLIAM HUEBNER, and
PETENWELL POTATO FARMS,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin
No. 77 C 407

Judge Barbara B. Crabb

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in the cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED AND REMANDED IN PART, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

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* Hon. Franklin T. Dupree, Jr., Senior District Judge for the Eastern District of North Carolina, sitting by designation.

In the

United States District Court

For the Western District of Wisconsin

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROLAND G. HUEBNER, WILLIAM HUEBNER, and PETENWELL POTATO FARMS,

Defendants.

Filed Aug. 4, 1983

Opinion and Order
No. 77-C-407-C

This civil action is before the court on plaintiff's motion to find the defendants in contempt of the consent order entered in this case on June 5, 1978.

In conformance with the procedure established by the Honorable James E. Doyle, to whom the case was then assigned, plaintiff filed proposed findings of fact which Judge Doyle adopted as Preliminary Findings of Fact, and which constituted plaintiff's prima facie case. From April 18 to April 20, 1983, defendants presented evidence in defense of the contempt proceeding and from May 11 to May 13, 1983, plaintiff presented rebuttal evidence and defendants presented surrebuttal evidence.

From the evidence of record, I now make the following findings of fact.

FACTS

Defendants Roland G. Huebner and William Huebner are residents of Nekoosa, Wisconsin. Defendant Petenwell Potato Farms, Inc. is a partnership of defendants Roland G. Huebner and William Huebner. Defendants own, operate, lease or otherwise control approximately 7,600 acres of land in Jackson County, Wisconsin, in Sections 22, 23, 26, 27, 34, 35, and 36 in Town-

ship 21 North, Range 1 East, and Sections 1, 2, 3, 4, 9, 10, 11, 13, 14, 23, and 24 in Township 20 North, Range 1 East. This farm site is located in an area known as Glacial Lake Wisconsin. This area has the largest continuous wetlands in Wisconsin. Generally, the area is comprised of large expanses of sedge meadows with some shrub swamps, bogs and occasional uplands. In its pre-project state, the wetlands areas of defendants' farm served several valuable functions normally associated with wetlands. The farm served as habitat for sandhill cranes, sharptailed grouse, marsh hawks, rough-legged hawks, shorteared owls, white-tail deer, and other wildlife species. The wetlands acted to trap sediments and nutrients, and to stabilize flows in Beaver Creek. During periods of high water, the wetlands slowed the flows. In periods of low precipitation, the stream flows were augmented. The wetlands also moderated stream temperatures and, because of the vegetative cover, reduced both wind and water soil erosion.

Plaintiff originally filed this action on November 17, 1977, seeking an injunction against certain activities defendants were pursuing on their land. The complaint alleged that defendants were depositing dredged and fill materials into wetlands on their property without first obtaining a permit from the Army Corps of Engineers in violation of the Federal Water Pollution Control Act (now the Clean Water Act), 33 U.S.C. §§ 1311, 1342, 1344. Following negotiations, this action was settled by a consent agreement entered into by the United States Attorney for this district and by counsel for the defendants. This agreement was embodied in the "Stipulated and Consented to Order" entered by Judge Doyle on June 5, 1978.

In paragraph 1 of the consent order, the court permanently enjoined the defendants from activities constituting the discharge of dredged or fill material into wetlands within Sections 1, 2, 3, 4, 9, 10, and 11 of Township 20 North, Range 1 East and in Sections 23, 26, 27, 34, 35, and 36 in Township 21 North, Range 1 East, "except as in accordance with a Department of Army permit and other lawful authority." Under paragraph 2 of the order, defendants were required to notify the Corps in writing 20 days prior to the discharge of dredged or fill material on any of the lands described. Also, defendants were required to under-

take a program of specified restoration work to be completed by August 1, 1978, and to maintain certain structures and conditions on their lands. Finally, defendants had to pay a civil penalty of $1,000.00. At all times pertinent to this proceeding, defendants had notice of the consent order and its provisions.

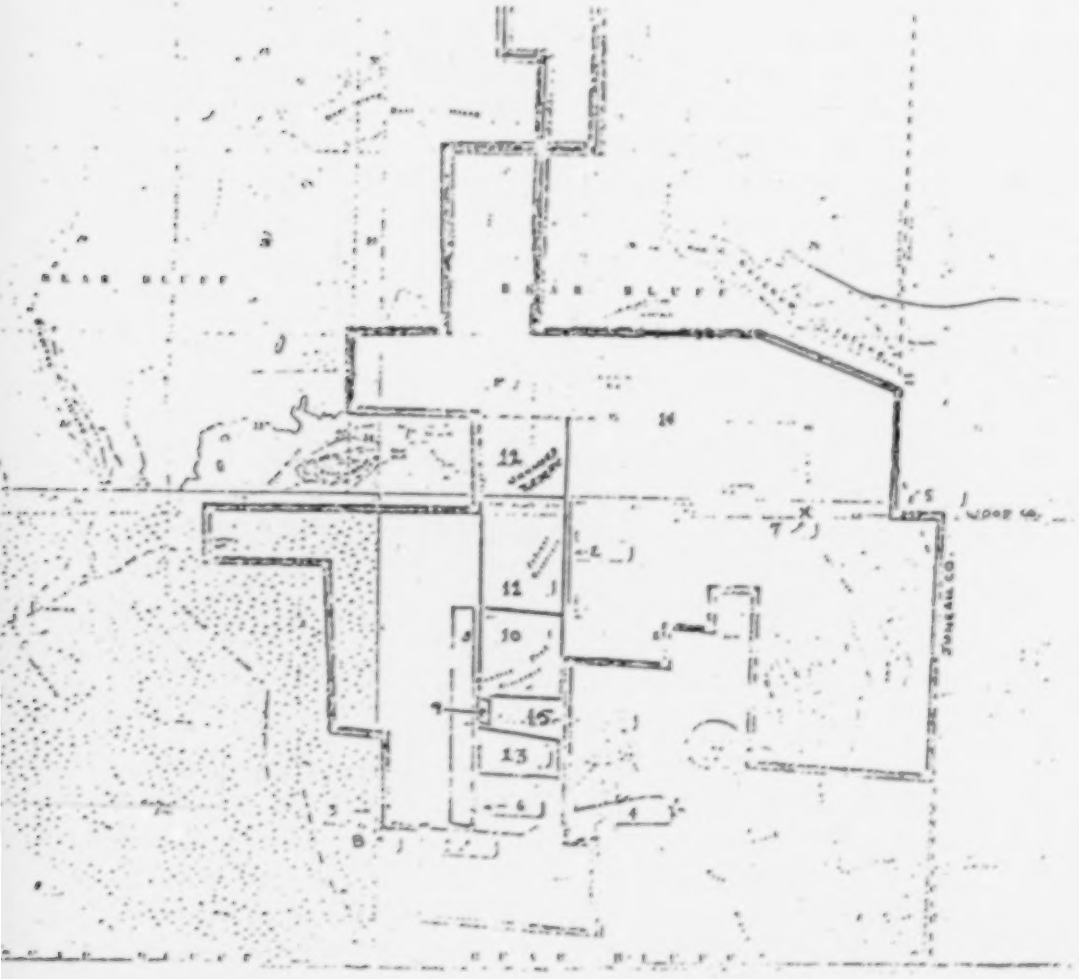
On November 6, 1979, Henrik Strandskov of the St. Paul District Corps of Engineers and Dick Knitter and Joan Koppa of the Wisconsin Department of Natural Resources, visited the defendants' Jackson County, Wisconsin farm site with defendants Roland and William Huebner and reviewed it for compliance with the June 5, 1978 order. Strandskov observed that the water levels in the defendants' project area were as high as or higher than those that had been observed in the prior two years. The Hunters Peak and Juleane Reservoirs were being maintained as wetlands and contained significant amounts of open water. In the main north-south ditch running along Bear Bluff Road where it intersects Stegge Place, the water level was high, but there was not much flow. The water level was controlled by a downstream structure.

Also on November 6, 1979, a control structure had been built across the north-south ditch at the southwest corner of Hunters Peak Reservoir, which connects with Beaver Creek to the south. The control structure was sound and functioning as intended. It contained control boards and was diverting water so that it flowed into the southwest corner of Hunters Peak Reservoir. The downstream side of the control structure embankment was stabilized with vegetation. The cuts in the dike on the eastern side of the reservoir were filled and intact.

As of November 6, 1979, a dike along the northeast edge of Juleane Reservoir had been restored at the intersection of Bear Bluff Road and Bear Bluff Road South. From this site, open water could be seen in Juleane Reservoir. A previously washed out ditch had been restored in the Unnamed Reservoir north of Juleane Reservoir. Water was flowing out of a control structure on the southwest corner of the restored site and the installed bulkhead was functioning properly. The reservoir contained high water levels consistent with historic water levels.

On November 16, 1979, the St. Paul District Office advised

defendant Roland Huebner that defendants had achieved compliance with this court's June 5, 1978 order. Since that time, defendants have undertaken a number of projects on their Jackson County farm, several of which are subjects of this contempt proceeding. For ease of description, these activities will be identified by the site at which they were performed, as shown on the map below.



Site 1 - Beaver Creek

On or before July 23, 1981, defendants permitted a neighboring farmer, Lloyd Wolfe, to clean out the portion of Beaver Creek running through defendants' property. Some of this creek had been cleaned four years earlier by defendants. In cleaning out the creek, Wolfe deepened and widened it beyond its earlier dimensions. Wolfe's purpose was to ensure that water could flow freely from defendants' property onto Wolfe's land to provide a water supply for Wolfe's cranberry marsh.

The deepening of the creek benefited defendants' own cranberry operation and made it possible for defendants to extend a ditch northward from Beaver Creek along the western boundary of their property.

Wolfe used a backhoe to take out material along the bottom of the creek and to sidecast it on the existing spoil banks. As a result of the work, material was sidecast onto wetlands adjacent to Beaver Creek from the point where the creek runs west from a line separating sections 10 and 11, Township 20 North, Range 1 East to the Center of Section 10, Township 20 North, Range 1 East. In the center of Section 10, the north spoil bank was widened by the deposit of material excavated from Beaver Creek into wetlands.

Defendants use the resulting spoil banks along Beaver Creek as roads, although the banks are many feet wider than what would be necessary to permit a vehicle to travel along them. Defendants have made no effort to construct or maintain the roads in a manner that would reduce their effect upon the adjacent wetlands or even to keep them from collapsing into the ditches. As of July 23, 1981, the previously excavated north and south banks of Beaver Creek showed erosion. In some areas in Section 10, the spoil banks had been bulldozed to keep them from becoming too high and the excess material was spread into the adjacent wetlands for a distance of 50 to 75 feet.

Depositing excavated material along the banks of the creek is more convenient and less expensive than hauling it away.

Site 2 - The North-South Ditch along the West Side of Bear Bluff Road Adjacent to the Hunters Peak and Juleane Reservoirs on the Section Line Between Sections 2 and 3.

On or before July 23, 1981, defendants used a backhoe to clean and deepen the existing ditch at this location. The material dug out by the backhoe was sidecast into a wetland along the banks of the ditch.

This ditch is part of the 6 to 7 miles of ditching in the reservoir area which has been operated to drain the soil in the reservoir area so as to permit the growing of dry land crops, such as corn. This ditch was constructed by defendants prior to the entry of the consent order on June 5, 1978. The ditching in the reservoir area has lowered the water table in the area from two to four feet.[1]

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[1] Although defendants have argued strenuously that all of the ditches at issue in this proceeding are irrigation ditches, I find their argument unpersuasive, except, possibly, as it relates to the Beaver Creek ditch, *see* discussion of site 1, text, *supra*.

In finding that the ditches in the reservoir area (sites 2, 6, and 14) and the northern extension of Beaver Creek operate primarily as drainage ditches, I have relied on the following evidence:

(1) Defendant William Huebner's admission in 1981 that the reservoir ditching had lowered the water table in the reservoirs two to four feet;

(2) Defendant Roland Huebner's testimony at the hearing that defendants' long-range plan was to plant corn in the reservoirs. (Corn requires drier land than what existed in the reservoirs after restoration but prior to defendants' ditching work);

(3) Defendants' plowing of the reservoir areas, in preparation for the growing of crops, an action consistent with the conversion of the area to dryland farming; (See discussion of Sites 10, 11, and 12, text, *infra*.)

(4) The testimony of Richard Knitter, Assistant Chief of the Water Regulations Section of the Wisconsin Department of Natural Resources. (Knitter testified that he had been on defendants'

(Footnote continued on following page)

[1] *continued*

property thirty or more times and had run elevations and done water flow studies. It was Knitter's professional opinion that the ditches in the reservoir area are all drainage ditches, with the exception of the east-west ditch at the southern edge of Hunters Peak Reservoir, north of the Stegge cranberry beds, which is a large, very deep ditch in contrast to the others which "weren't deep enough with the volume of water that was in them." (Transcript, p. 278));

(5) The testimony of Al Kean, hydrologic engineer specialist, Corps of Engineers. (Kean testified that he had visited defendants' property three times; that he observed the ditches in the reservoir area in August, 1982, and that it was his opinion that the deepening and widening north-south ditches on the eastern and western boundaries of Hunter's Peak Reservoir enhanced the drainage potential in the area, by disturbing the vegetation on the banks of the ditches, by lowering the water levels in the ditch and with them, the surrounding ground water levels, and by increasing the flow capacity of the ditch and concomitantly decreasing the time for surface waters to flow out of a given drainage area. (Transcript, pp. 634-37) Kean testified that the ditches could also act as water storage areas with the installation of flow control structures within the ditches, without changing their basic character as drainage ditches. (Transcript, pp. 640-41));

(6) The testimony of defendants' expert, Robert Karnouskas. (This testimony did not controvert Kean's and Knitter's testimony about the purpose of the ditches in the reservoir area. Karnouskas visited defendants' property only once, in April, 1983, at a time when the ground water levels "were probably very close to their highest seasonal levels." (Transcript, p. 337). Karnouskas testified that at the time of his visit, the surface levels of the reservoir area ditches "were being maintained at about the maximum practical level that one could maintain those ditches at." (Transcript, p. 338) He went on to say,

> Certainly the effect of cleaning the ditches and deepening them if all the stop logs were removed out of those dams, deepening and cleaning those ditches would certainly enhance those ditches' ability to lower the water table. But the way

(Footnote continued on following page)

The spoil banks of the ditches are wider than what would be necessary to accommodate defendants' farm vehicles. The banks erode into the ditches, requiring them to be redredged for cleaning every three to five years.

Site 3 - A New North-South Ditch Extending Northward from Beaver Creek on the Section Line Between Sections 9 and 10, Along the Western Boundary of Defendants' Property.

On or before July 23, 1981, defendants used a dragline to excavate a new ditch approximately 400 feet long at this location. The excavated materials were sidecast onto wetlands alongside the ditch. In order to avoid a hill in the middle of the spoil bank which would prevent its being used as a road, defendants spread the spoil material into several adjacent acres.

Although on July 23, 1981, defendant William Huebner indicated that defendants would continue digging the ditch north approximately 1½ miles to Bear Bluff, defendants have never done so.

Site 4 - Lloyd Wolfe's Property

None of the activity at this site is a part of this proceeding.

Site 5 - East-West Ditch Along the Southern Border of Section 36, Township 21 North, Range 1 East.

On or before August 13, 1982, but after June 16, 1981,

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[1] *continued*

> that those ditches are being operated, maintaining the surface water levels at the highest levels, just the mere act of deepening the ditches would have no effect on groundwater levels.
>
> (Transcript, p. 339) This testimony is consistent with Kean's and Knitter's observations that with the installation of stop logs and bulkheads the ditches *could* be operated for irrigation purposes.)

defendants excavated a new ditch in order to construct a 900 foot long road at this location.[2] In constructing the road, defendants took material out of the ditch, placed it on what was then the bank of the ditch and leveled off the resulting spoil bank into wetlands adjacent to Hay Creek so that logging trucks could use the land as an exit road from defendants' property to the county line road.

There are no culverts in the newly-constructed road, even at the end of the new road where it meets Cranberry Road at the Jackson-Juneau County line and intersects an existing ditch. There is no bracing or any other attempt at stabilizing the fill to prevent erosion. The road construction has disturbed the vegetation in the area of the road and the ditch.

Site 6 - North-South Ditch Along West Side of Hunters Peak Reservoir in Section 3, From a Point South of the Bulkhead at the Southwest Corner of Hunters Peak Reservoir.

On or before August 13, 1982, but after June 2, 1982, defendants excavated and deepened the ditch at this location and sidecast the excavated material upon an existing spoil bank. Defendants then spread or leveled the top two to three feet of material onto several acres of adjacent wetlands so as to flatten the spoil bank for use as a road.

There are two culverts in the spoil bank road.

As noted in connection with the north-south ditch on the

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[2] Although William Huebner testified that there was an existing ditch at this location, I do not find his testimony believable. Plaintiff's Exhibit 10, and aerial photograph taken on October 4, 1977, shows no ditch in this location. Defendants' Exhibit 11, on which defendant William Huebner marked in green all ditches existing as of September, 1977, does not show a ditch running all the way east to Cranberry Road. Finally, defendants' Exhibit 28EE reveals that the new ditch is located to the south of the new road, whereas the ditch to the west (which ends approximately where the new ditch begins) is located on the north side of the new road and is not connected to the new ditch. It is irrational to think that any previously-existing ditch would have been built with a non-connecting jog.

east side of this reservoir, this ditch is part of a network of ditches surrounding the reservoir areas which defendants have used to drain the wetland within the reservoirs for conversion to dry land farming, although the ditches can be used also for irrigation purposes.

Site 7 - Hay Creek, at a Point Where the Creek Crosses the Section Line Between Sections 36 and 1.

On or before August 13, 1982, defendants placed a new bulkhead and earthen fill structure into Hay Creek at this location to replace a dam that had washed out on July 1, 1982. Defendants installed a tube with a bulkhead in front of the bed dam on an emergency basis.

Site 8 - Beaver Creek, at the Point Where the Creek Crosses the Section Line Between Sections 9 and 10.

On or before August 13, 1982, but after June 16, 1982, defendants installed a bulkhead into Beaver Creek at this location.

Site 9 - Westward Expansion of Cranberry Beds into South one-half of Southeast Quarter of Section 3.

On or before April 9, 1981, defendants expanded the existing cranberry beds in this location approximately 450 feet westward to a north-south ditch running along the western edge of Hunters Peak Reservoir, for a total area of about 10 acres. In constructing the new cranberry beds, the defendants used excavated material for dikes. The expansion area is part of a wetland adjacent to Beaver Creek.

When defendants began the expansion work the site was two feet higher than the existing beds. The area was not cultivated, but had vegetation in the form of willow shrubs, poplar trees, and grasses.

Sites 10 (Hunters Peak Reservoir), 11 (Juleane Reservoir), and 12 (Unnamed Reservoir).

As part of the June 5, 1978 consent order, defendants agreed to replace the embankment at the southwest corner, and fill all cuts in the embankment along the east side of the reservoir.

At some time prior to July 23, 1981, defendants plowed an area in Hunters Peak Reservoir, using a marsh plow and removing wetland vegetation and disturbing the soil. Sometime after July 23, 1981, but before August 13, 1982, defendants plowed the remaining wetland in Hunters Peak Reservoir. At some time between August 13, 1982 and December 9, 1982, defendants plowed and leveled the dikes in Hunters Peak Reservoir.

As part of the June 5, 1978 consent order, defendants agreed to replace the embankment along the east side of Juleane Reservoir, replace the embankment at the southwest corner of the reservoir, and leave open the culvert beneath Bear Bluff Road where it intersects with Bear Bluff Road South.

On or before September 13, 1982, defendants plowed an area of Juleane Reservoir with a marsh plow, uprooting wetland vegetation and overturning the peat soils in the reservoirs. Sometime after September 13, 1982, but before December 9, 1982, defendants plowed the remainder of the wetland area in Juleane Reservoir. The plowing included the leveling of the dike along the southern edge of Juleane Reservoir.

As part of the consent order of June 5, 1978, defendants agreed to leave open the culvert at the point where Bear Bluff Road intersects with the dike in the Unnamed Reservoir, replace the embankment along the east side of the reservoir, and reopen the ditch on the west side of the embankment located in the northwest one-quarter of Section 35, Township 21 North, Range 1 East.

Sometime prior to September 13, 1982, defendants plowed in the Unnamed Reservoir. Prior to December 9, 1982, defendants completed the remainder of the plowing in the wetland in

the southeast quarter of Section 34, and the southwest quarter of Section 35. During the period between August 13, 1982 and December 9, 1982, defendants plowed and leveled the dikes in the Unnamed Reservoir.

Defendants also agreed as part of the June 5, 1978 consent order to restore all of the specified embankments to the dimensions which existed prior to the commencement by defendants of the discharge operations of dredged or fill materials alleged in the complaint and maintain and operate the restored control structures and reservoirs "in a safe manner, for maximum drainage control, and to protect the integrity of the dikes and the structures therein."

Prior to the discharge operations that led to the bringing of the original action in 1977, each of the reservoir areas was a wetlands and held significant amounts of open water during portions of each year, although not permanently. After the completion of the restoration work in 1979, there was again significant open water in the reservoirs.

The widening and deepening of the ditches bordering the reservoirs drained water from these areas and lowered the ground water from two to four feet, enabling defendants to plant crops in the reservoir.

The reservoirs contain Dawson Peat and Newson Sand soils. These soils will not support the growth of corn or other dry land crops unless they are drained. Plowing of these soils in the reservoir area decreased their capacity to store water because it mixed the sandy subsoil with the less permeable organic top soil, making the resulting top soil more permeable.

Site 13 - Northeast Quarter of Section 10, Township 20 North, Range 1 East.

On or before December 9, 1982, defendants used a bulldozer to scrape and redistribute surface materials in a wetlands area at this location.

Although defendants stated that they were doing nothing more than spreading out the ashes from burned piles of trees in this area, they used a bulldozer to move large mounds of dirt and to level the entire ten to twelve acre area.

Site 14 - Ditches running West From a Worn Bridge Located in the Middle of Section 35, Township 21 North, Range 1 East, and South From This Location Along the West Side of Bear Bluff Road.

On or before June 12, 1980, defendants deepened the ditches at this location and sidecast the excavated material along the ditches. Some of the material fell upon existing material banks and some fell upon wetland adjacent to the ditch and Beaver Creek.

This ditching activity was part of a network of ditching that had the purpose and effect of draining the three reservoirs, Unnamed, Juleane, and Hunters Peak, to permit the cultivation of crops in the reservoir areas.

Site 15 - Old Bogge Cranberry Beds in South Half of Southeast Quarter of Section 3.

On or before June 12, 1980, defendants made alterations in a current cranberry bed at this location. As of June 12, 1980, defendants had leveled one dike into the wetland and had undertaken a surface scraping operation in which the vegetation in the cranberry beds was removed and deposited on the remaining dikes enlarging them.

At no time since the entry of the consent order on June 5, 1978, did defendants ever send the St. Paul District Corps of Engineers, General Regulatory Branch written notification, twenty days in advance, of the commencement of any activity involving the discharge of dredged or fill material on any portions of the land described in the consent order. At no time did defendants ever have a Corps of Engineers permit for the work that they did on the Jackson County farm.

Although it is implicit in these findings that plaintiff has established that the areas it characterized as wetlands are wetlands in fact, I will make it explicit that I find as fact that these areas are wetlands as that term is defined in the Federal Water Pollution Control Act and carried over into the Clean Water Act.

OPINION

In this action for civil contempt pursuant to 18 U.S.C. § 401, I consider that it is plaintiff's burden to prove, by clear and convincing evidence, that defendants undertook activities constituting the discharge of dredge or fill materials into wetland areas on their Bear Bluff Farm without a permit; that they failed to provide the Corps with prior written notice of the discharge of dredged or fill material on any portions of their land described in the consent order; and that they failed to maintain the restoration work and to operate it for maximum drainage control in the Hunters Peak, Juleane, and Unnamed Reservoirs, all in violation of the consent order. With regard to the permit and notice requirements of paragraphs 1 and 2 of the consent order, it is part of plaintiff's burden of proof to establish that defendants' activities fell within the statutory and regulatory meaning of the phrase "discharge of dredge or fill materials." Therefore, plaintiff must prove that the alleged discharge did not fall within the exceptions set out in the Federal Water Pollution Control Act, 33 U.S.C. § 1344(f)(1), and 47 Fed. Reg. No. 141, p. 31812-13 (July 22, 1982) (to be codified at 33 C.F.R. § 323.4), and incorporated implicitly into the consent order.[3]

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[3] In an order entered April 11, 1983, I held that the phrase "discharge of dredged or fill material" as used in the consent order incorporated the statutory and regulatory exclusions narrowing the legal meaning of the phrase:

> Defendants are correct in pointing out that, prior to entry of the consent order in this case, the terms "dredged material" and "fill material" were defined in the regulations implementing the FWPCA to exclude the results of certain "normal" farming activities. *See* 40

(Footnote continued on following page)

In defending against the civil contempt action, defendants have placed emphasis upon these exceptions to the discharge activities otherwise prohibited under the Federal Water Pollution Control Act (now the Clean Water Act). Under 33 U.S.C. § 1344(f), certain discharges of dredged or fill material do not require a permit from the Corps of Engineers. These include discharges

> (1) . . .
>
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, . . . and transportation structures;
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
>
> * * *
>
> [and] (E) for the purpose of construction or maintenance of farm roads or forest roads, . . . where such roads

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:: *continued*

Fed. Reg. No. 144, p. 31325 (July 25, 1975) (interim regulations); 40 Fed. Reg. No. 173, p. 41298 (Sept. 5, 1975) (final regulations), revised in 42 Fed. Reg. No. 13, p. 37145 (July 19, 1977). *See also*, 47 Fed. Reg. No. 141, p. 31811 (July 22, 1982). It therefore appears, as defendants argue, that the phrase "discharge or dredged or fill material" was of special legal significance when used in reference to activities potentially falling within the scope of the FWPCA. Since the lawsuit culminating in entry of the consent order was initiated to enforce the FWPCA, it can therefore be assumed that both parties knew of the special legal significance attached to that phrase when they intended that the legal meaning of that phrase carry over into paragraph 2 of the consent order.

> are constructed and maintained in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized[.]

However, the provisions of § 1344(f)(1) are subject to the following exception:

> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

Defendants assert that their activities are not prohibited discharges that would require a permit because they fall within one or more of the provisions of § 1344(f)(1). Defendants contend that they have not violated the restoration area requirements because the agreed-upon embankments remain in place in the reservoirs and the water table level has been kept up. Also, they argue that they cannot be compelled to maintain the reservoirs so that they hold standing water because such a requirement would be impossible to accomplish.

The Clean Water Act, and the June 5, 1978 consent order which was entered to enforce the Clean Water Act, are to be construed in light of the purpose of the Act. As set forth in 33 U.S.C. § 1251, that purpose "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Although Congress made revisions in the permit requirements in 1977, it did not back away from this basic purpose:

> The committee bill includes a provision which utilizes existing legislative mechanisms, and maintains the primary thrust of section 404 [the permit requirement] with respect to

> protection of wetlands from spoil and fill discharges where wetlands protections is an important need. At the same time, the bill tries to free from the threat of regulation those kinds of manmade activities which are sufficiently de minimis as to merit general attention at State and local level and little or no attention at the national level.

Sen. Rep. No. 95-370 at 10-11, reprinted in [1978] U.S. Code Cong. & Ad. News 4326, 4337 ("Sen. Rep."). The report sets forth the importance of wetlands on p. 10, U.S. Code Cong. & Ad. News at 4336, and the destructive potential of unregulated discharge into wetland areas is set forth in 40 C.F.R. 230.41(b) (1982). *See also* comments of Senator Stafford quoted in *Avoyelles Sportsman's League v. Alexander*, 473 F. Supp. 525, 533 n. 11 (W.D. La. 1979):

> The [Section 404 permit] process is an essential tool for preventing the unnecessary degradation of water quality by discharges of dredged or fill material. Without it, critical aquatic areas including swamps, marshes, and submerged grass flats, which are such an important segment of this Nation's water resource and are essential to the preservation of migratory and resident fish, bird and other animal populations, might otherwise be irrevocably destroyed.

It is clear that the amendments that created the subsection (f) exceptions on which defendants rely were not intended to exempt all farming operations from the permit requirements, but only those whose effect upon wetlands or other waters was so minimal as not to warrant federal review and supervision. Defendants' activities must be analyzed in light of the purposes of the Clean Water Act, the intended scope of the exemptions for farming activities, and the terms of the consent order.

Site 1 - Beaver Creek

Section 1344(f)(1)(C) exempts discharges "for the purpose of construction or maintenance of . . . irrigation ditches, or the maintenance of drainage ditches." If the dredging of a particular ditch merely returns it to its original size and shape, this would

constitute exempted maintenance, making it irrelevant whether the ditch were an irrigation or drainage ditch. However, if, as in this instance, the work deepens and widens the ditch beyond its original dimensions, it is construction work and only irrigation ditches are exempt.

Wolfe's stated purpose for enlarging the creek was to ensure a water supply for his own cranberry operation. This, and the proximity of the creek to defendants' cranberry beds make it possible that the dreged-out creek serves primarily as an irrigation ditch and comes with the (f)(1)(C) exception. Plaintiff has not proven that it is not an irrigation ditch.

It does not follow, however, that the deposit of the dredged-out creek bed along the sides of the creek is an excepted activity. Subsection (f)(1)(C) grants an exception where the *discharge* is for the *purpose of construction or maintenance*. I interpret this language as exempting only those deposits which go to make up a dike that is an integral part of the ditch. If the resulting spoil bank is merely incidental to construction; that is, it is created simply because it is easier and cheaper to dump the spoil on the site than to haul it to an upland area for deposit, the purpose is not construction, but convenience. If the buildup of the spoil bank is not reasonably necessary to the purposes of irrigation, the spoil bank is no different from any other dike in a wetlands area and is exempt only if it qualifies under another exception.

If the discharge is onto an existing spoil bank with only incidental droppings onto the wetlands, there is only minimal impact on water quality and the wetlands. Such a discharge should be exempt either under (f)(1)(C) where the spoil bank is an integral part of the ditch, or (f)(1)(B) as "maintenance . . . of [a] currently serviceable structure such as a dike . . ." The Senate Report indicates that such exempt "maintenance does not include maintenance that changes the character, scope, or size of the original fill." Sen. Rep. at 76; U.S. Code Cong. & Ad. News at 4401. I construe this size limitation as relating only to the base dimensions of a dike. If any but minimal discharge into the surrounding wetlands occurs, that discharge must either qualify under a separate exemption or be pursuant to a permit.

If the sidecasting is neither onto an existing spoil bank nor for the purpose of constructing a structure integral to the function of a newly constructed irrigation ditch, it must be analyzed under the farm road exception (f)(1)(E) (assuming, as I am prepared to, that defendants actually use the spoil bank as a farm road).[4] Unlike the exceptions for "existing spoil bank" and banks "integral to newly constructed irrigation ditch," the construction of farm roads is exempted from the permit requirement only "where such roads are constructed and maintained, in accordance with the best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized." 33 U.S.C. § 1344(f)(1)(E).

47 Fed. Reg. 31813 (to be codified at 33 C.F.R. § 323.4(a)(6)) contains a lengthy list of what are considered to be "best management practices" in road building and maintenance, including holding the number, width, and total length of such roads to the minimum feasible amount consistent with the specific farming conditions, bridging and culverting the roads to prevent the restriction of expected flood flows; stabilizing and maintaining the fill during and following construction to prevent erosion; designing, constructing, and maintaining the road to keep vegetative disturbance to a minimum; locating roads sufficiently far from streams or other water bodies to minimize discharges of dredged or fill material into waters of the United States; and making discharges to construct road fill "in a manner that minimizes the encroach-

[4] This is giving the broadest possible reading to defendants' assertions. Although defendants have asserted a "farm road" exemption for all of their spoil banks and dikes, defendant William Huebner testified that not all of the spoil banks were used for travel. *See* transcript, p. 48 ("Most of these [spoil banks] were the means of the roads") and p. 400, ("I'd say nine out of ten, or the ratio might be higher than that, all the sidecastings are or the tops are topped off and turned into farm roads"). I am prepared to assume that all of the spoil banks in question are used as roads by defendants only because plaintiff did not prove that any of them were not used in that way.

ment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself."

Clearly, the build-up of the spoil bank along Beaver Creek was not necessary to the construction of the ditch or to advance the irrigation capability of the ditch. Wolfe was simply piling up the discharge onto the banks where it soon began to erode back into the creek, filling it up again. The excess build-up had to be bulldozed and spread out for a distance of 50 to 75 feet to keep the spoil bank from becoming too high; an action that reveals that the primary reason for the build-up was convenience and not construction of an irrigation dike.

The discharge was not exempt under the dike maintenance exception, because it changed the original size and was not a de minimis discharge. In places along Beaver Creek, and specifically, in the center of Section 10, the deposit of dredged and fill material from the creek widened the north spoil bank, thereby changing "the size of the original fill." The "incidental" discharge for a distance of 50 to 75 feet beyond the original spoil bank into the wetlands cannot be considered "de minimis."

Finally, the discharge was not exempt under the farm road construction exemption. The deposits made the bank too high to be used as a road until it had been bulldozed and spread out into the wetlands; the "road" was not stabilized in any manner to prevent erosion during or after construction; and the resulting road was far wider than would be minimally necessary to accommodate defendants' farm vehicles.

I find and conclude that plaintiff has proven clearly and convincingly that the deposit upon spoil banks of dredged and fill material from the deepening and widening of Beaver Creek was a prohibited discharge of dredged or fill material in wetlands without a permit and without prior written notice to the Corps. In allowing this to be done, defendants acted in violation of paragraphs 1 and 2 of the consent order.

Site 2 - North-South Ditch East of Hunters Peak and Juleane Reservoirs, on Section Line Between Sections 2 and 3.

Throughout this contempt proceeding, defendants have made much of the distinction between drainage ditches and irrigation ditches, contending that all of the disputed ditches are irrigation ditches, exempt from the permit requirement. The characterization of a ditch as an irrigation ditch does not end the inquiry into the necessity for a permit. The general exemption for irrigation ditches is inapplicable if the construction of the ditch involves the discharge of dredged or fill material into wetlands *and* the ditch is built for the purpose of bringing an area of the navigable waters into a use to which it was not previously subject, "where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2).

Because the ditches surrounding the reservoir areas were operated to drain the reservoirs in preparation for dry land farming, the enlargement of these ditches is not an activity excepted from the permit requirements. The ditches reduce the reach of waters of the United States (which, of course, include wetlands, 47 Fed. Reg. 31810 (to be codified at 33 C.F.R. § 323.2(a)); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979)). This is so, even if the ditches are equipped and designed to be used for irrigation purposes during some portions of the year.

To hold otherwise would be to read the Clean Water Act as allowing farmers to construct ditches that drain whole sections of wetlands for conversion to dry land farming if they use the same ditches to hold water for irrigating their dry land crops during periods of low rainfall, or as allowing farmers to construct ditches that have the effect of draining areas of wetlands, provided only that the ditches carry that water downstream to provide extra water for a wetlands crop such as cranberries. Such a reading of the Act would be inconsistent with its stated purpose of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."

I find and conclude that the enlargement of this north-south ditch was a prohibited activity; that it involved the discharge of

dredged or fill material onto a wetland in connection with the construction of a drainage ditch; and that the fact that this ditch has operated to drain a wetlands deprives it of any claim to an exception under 33 U.S.C. § 1344(f)(1). *See also* 47 Fed. Reg. 31813 (to be codified at 33 C.F.R. § 323.4(c) & n. 4). Therefore, I conclude that in widening and deepening this ditch, without a permit and without prior written notice to the Corps, defendants acted in violation of paragraphs 1 and 2 of the consent order.

Site 3 - The New North-South Extension of Beaver Creek Along the Western Boundary of Defendants' Property.

Whether this is an irrigation ditch, as defendants contend, or a drainage ditch as plaintiff asserts, the deposit of dredged material onto the wetland without a permit is a prohibited activity under the Clean Water Act and a violation of this court's consent order.

The deposit of dredged material onto the banks of the newly-dredged ditch exceeded whatever diking might have been necessary for the construction of an irrigation ditch or for the construction of a farm road, requiring defendants to use bulldozers to spread the excess into several acres of wetlands adjacent to the ditch. Several acres is not a de minimis discharge.

Site 5 - East-West Ditch Dredging for Construction of New Road

I find and conclude that plaintiff has established by clear and convincing proof that the ditching for the purpose of constructing this new road violated the terms of both paragraphs 1 and 2 of the consent order. The ditching involved the discharge of dredged material onto wetlands; it was done without a permit; and the construction did not fall within the farm road exception or any other exception to the permit requirement.

The ditch was dredged only for the construction for the new road. It does not qualify for any exception that might be available

for an irrigation or drainage ditch and the manner of construction of the new road was not consistent with the required best management practices. The road fill was not stabilized; no culverts were installed; and the road is larger than what would be minimally necessary for its purpose. *See* 47 Fed. Reg. 31813 (to be codified at 33 C.F.R. § 323.4(a)(6).

Site 6 - North-South Ditch Along West Side of Hunters Peak Reservoir

Like the north-south ditch on the eastern edge of Hunters Peak Reservoir, site 2, this ditch is part of a network of ditches that operate to drain the wetland area of the reservoirs. Because it is used for this purpose, the ditch does not qualify for the irrigation ditch exception to the permit requirement. Defendants' deepening and widening of the ditch constitutes construction work requiring a permit.

Even if the ditch were considered to be an irrigation ditch, the discharge of spoil material onto the wetlands during construction would require a permit. The dumping of the material was in excess of anything necessary for the building up of a dike integral to any irrigation purposes of the ditch; the deposit is not excepted as a farm road (because best management practices were not followed); and the spreading of the spoil bank into several acres of adjacent wetlands is not a de minimis discharge.

I find and conclude that plaintiff has established by clear and convincing proof that defendants violated paragraphs 1 and 2 of the consent order when they deepened and widened this ditch and discharged spoil material onto the wetlands without a permit and without notice.

Site 7 - Installation of Bulkhead in Hay Creek

I conclude that as to this challenged activity, plaintiff has not met its burden of proving that the activities are not excepted

from the permit requirement under 33 U.S.C. § 1344(f)(1)(B), as being "for the purpose of maintenance, including *emergency reconstruction* of recently damaged parts, of currently serviceable structures such as dikes, dams . . ." (Emphasis added.)

Site 8 - Installation of Bulkhead in Beaver Creek at Section Line

The installation of the new bulkhead at this location was for neither regular nor emergency maintenance purposes, but may be exempt under 33 U.S.C. § 1344(f)(1)(C) as part of an irrigation ditch. I conclude that the evidence does not establish clearly and convincingly that the installation of this bulkhead constituted the non-excepted discharge of dredged or fill material onto a wetland in violation of the terms of the consent order.

Site 9 - Westward Expansion of Cranberry Beds

The expansion of the beds at this location without a permit violated both paragraphs 1 and 2 of the consent order. The work involved the discharge of dredged or fill material into wetlands in the construction of the dikes between the beds and was not exempt under the general exception for farming activities. *See* 47 Fed. Reg. 31812 (to be codified at 33 C.F.R. § 323.4(a)(1)(ii)):

> To fall under this exemption [for normal farming activities] the activities specified in paragraph (a)(1)(i) must be part of an established (*i.e.*, on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

As a new activity in this area, the expansion of the cran-

berry beds is not exempt. Even if this area had been used for cranberry production in the past, that use was far too long ago to support defendants' contention that they were merely restoring the area to its old use, not bringing it into a new use.[5]

Sites 10, 11, and 12 - The Reservoirs

From the testimony adduced at trial, it appears that defendants believe that the only purpose of the restoration work required under the consent order is to enable the reservoirs to hold standing water level on a permanent basis. If this is so, defendants have misconstrued the order. Read in the context of the Clean Water Act which it was intended to enforce, the consent order is clear: defendants are obligated to undertake the restoration *and maintenance* of the chemical, physical, and biological integrity of the reservoir wetlands in the condition in which they existed before defendants began their ditching and dredging activities in 1977.

The consent order does not require the defendants simply to maintain the ground water levels in or around the reservoir areas as defendants seem to think, but to maintain and operate specially-designated control structures and "to protect the integrity of the dikes and structures therein." By leveling the prescribed embankments in the reservoirs, defendants clearly violated the requirements of paragraphs 4, 5, and 7 of the consent order. Defendants further violated the terms of these paragraphs by their plowing in the reservoir, which both accelerated the drain-

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[5] Robert Strozewski, who had lived on the Bear Bluff farm as a boy, testified that his parents had done some cranberry growing in the expansion area in the 1930's. That testimony is subject to question since the land in that area was two feet higher than the land to the east that had been cultivated for cranberries by the Stegges and by Lloyd Wolfe who owned the land after the Stegges. In any event, production of a crop in the 1930's does not mean that an area is in an established use in the 1980's, particularly when the evidence is that the land was not cultivated and had grown over with willow and poplar trees.

age capacity of the reservoirs in direct violation of the requirement that defendants maintain the areas for maximum drainage control and destroyed the existing wetland vegetation. The defendants' wetlands served as wildlife habitat, and performed the functions of cleansing ground water and stabilizing water flows. These functions are impaired by the removal of wetland vegetation and the disturbance of the soils underlying that vegetation regardless of whether the drainage is affected. *See Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. at 533.

I find and conclude that plaintiff has shown clearly and convincingly that defendants have violated paragraphs 4, 5, and 7 of the consent order.

Site 13 - Northeast Quarter of Section 10

Although defendants contend that their work in this site was confined to the burning and subsequent clean up of a few piles of brush and timber, the evidence does not support the contention. The extensive bulldozing and scraping that took place over this ten to twelve acre area would not have been necessary merely for the clean up of the limited amounts of material present in the area before the work began. In any case, the spreading out of ashes from the burning does not fall within any exception to discharges prohibited under the Clean Water Act. The widespread destruction of the previously-existing wetland foliage is certainly a prohibited discharge; the scraping up of material excavated from wetlands (waters of the United States) constitutes a discharge. *Avoyelles Sportmen's League v. Alexander*, 473 F. Supp. at 533. ("[W]etlands include the vegetation that grows thereon. Such lands in the absence of vegetation can supply hardly any of the purposes of the [Clean Water] Act.")

I find and conclude that plaintiff has shown that defendants' scraping and redistribution of wetlands soil and vegetation in this area without a permit and without prior written notice to the Corps violated paragraphs 1 and 2 of the consent order.

Site 14 - Ditch in Section 35

Plaintiff has established by clear and convincing proof that the defendants deepened a drainage ditch and discharged material dredged from the ditch onto a wetland area. Because the purpose and effect of this discharge was to drain wetland areas in preparation for dry land farming, and because defendants did not give the Corps prior written notice of the discharge, that discharge violated paragraph 2 of the consent order.[6]

Site 15 - Old Stegge Cranberry Beds

Altering the size and number of dikes within the established cranberry beds falls within 47 Fed. Reg. 31812 (to be codified at 33 C.F.R. § 323.4(a)(1)(iii)(C)(1)(ii) and (iii)), as "Minor Drainage" under the "normal farming exception" of § 1344(f)(1)(A). Subsection (ii) exempts from the permit requirements the installation of "water control facilities incidental to planting, cultivating, protecting, or harvesting of . . . cranberries . . ., where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvacultural wetland crop production." Subsection (iii) exempts discharges "for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use of production of. . . cranberries. . ." Plaintiff has not proven that the alterations within the Stegge marsh constituted a "discharge of dredged or fill materials" within the meaning of the consent order. Thus, defendants did not violate that order by failing to provide prior written notice to the Corps.

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[6] Plaintiff has challenged the activities at sites 14 and 15 only as violations of paragraph 2 of the consent order.

I find and conclude that with respect to the activities at sites 1, 2, 3, 5, 6, 9, 10, 11, 12, 13, and 14, defendants have violated the provisions of the consent order entered in this case on June 5, 1978, and that they are in contempt of court.

Entered this 3d day of August, 1983.

BY THE COURT:

Barbara B. Crabb

Barbara B. Crabb
District Judge

In the
United States District Court
For the Western District of Wisconsin

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROLAND G. HUEBNER, WILLIAM HUEBNER, and PETENWELL POTATO FARMS,

Defendants.

Civil Case
No. 77-C-407-C

Docket No. 138
Filed Nov. 4, 1983

ORDER

A hearing having been held in this case before the United States District Judge Barbara B. Crabb on September 27-29, 1983, and an order having been entered on November 1, 1983,

IT IS HEREBY ORDERED pursuant to and in accordance with said previous order that the defendants, Roland G. Huebner, William Huebner, and Petenwell Potato Farms, comply with the following restoration plan.

RESTORATION PLAN

1. The purpose of this plan is to restore water levels and associated environmental conditions consistent with the terms and requirements of the Court's June 5, 1978 order. A site map (Exhibit A) is attached which notes the specific locations of each requirement and highlights the ditches excavated by William Huebner, Roland Huebner and Petenwell Potato Farms and existing as of September 7, 1983.

In order to achieve the above-stated purpose, defendants are required to do the following:

(a) Raise, operate and maintain the existing flow control structure in Beaver Creek just west of the north-south ditch in the southeast quarter of the northeast quarter of Section 10, T.20N., R.1E. (Exhibit A, item B). The riser on this structure should be raised and operated to maintain the normal water level upstream of the structure at approximately elevation 978. The erosion problems at this structure should be repaired.

(b) Operate and maintain existing flow control structure in Beaver Creek at the western boundary of Section 10, T.20N., R.1E. (Exhibit A, item C). The normal water level upstream of this structure should be maintained at approximately elevation 979. The erosion problem at the outlet of this structure should be repaired.

(c) Construct a channel plug just north of Beaver Creek in the north-south ditch that follows the boundary between Sections 9 and 10, T.20N., R.1E. (Exhibit A, item D). The existing culvert through the ditch crossing at this location must be removed.

(d) Operate and maintain the existing flow control structure located in the north-south ditch at the southeast corner of Section 3, T.20N., R.1E. (Exhibit A, item E), so as to maintain the normal water level on the upstream side of the structure at approximately elevation 975.

(e) Install, operate and maintain a flow control structure in the north-south ditch along the west side of Bear Bluff Road South, just downstream (south) of the southern-most existing east-west ditch in the southwest quarter of Section 2, T.20N., R.1E. (Exhibit A, item F). The normal water level upstream of this structure should be maintained at approximately elevation 978. A culvert with riser, having a minimum diameter of 48 inches (or an equivalent structure) should be utilized at this location.

(f) Remove the channel plug at the north end of the water supply ditch that runs northwest-southeast in the south-east quarter of Section 2, T.20N., R.1E. (Exhibit A, item G).

(g) Remove the existing culvert and construct a channel plug at the northern end of the north-south ditch that bisects Section 2, T.20N., R.1E. (Exhibit A, item H).

(h) Reconstruct the north-south and east-west embankments that impounded Hunters Peak Reservoir, located in Section 3, T.20N., R.1E. (Exhibit A, item I). These embankments should have a continuous top elevation of approximately 981. Any drainage pipes through these embankments that are not associated with reservoir operation must be removed.

(i) Raise, operate and maintain the existing flow control structure through the north-south reservoir embankment at the south-east corner of Hunters Peak Reservoir, and the existing flow control structure through the east-west embankment of Hunters Peak Reservoir at the north-south ditch that bisects Section 3, T.20N., R.1E. (Exhibit A, item J). The risers on these structures should be raised and operated to maintain the normal high water level in Hunters Peak Reservoir at approximately elevation 980. The erosion problem at the outlet of the structure through the east-west embankment should be repaired.

(j) Reconstruct the entire embankment of Juleane Reservoir, located in the northeast quarter of Section 3, T.20N., R.1E. (Exhibit A, item K). This embankment should be reconstructed along the previous alignment with a continuous top elevation of approximately 982. Any drainage pipes through this embankment that are not associated with reservoir operation must be removed.

(k) Operate and maintain the existing flow control structure through the Juleane Reservoir embankment at the north-south ditch that bisects Section 3, T.20N., R.1E. (Exhibit A, item L) so as to maintain the normal high water level in this reservoir at approximately elevation 981. The erosion problem on the downstream side of this structure should be repaired.

(l) Reconstruct the portion of the unnamed reservoir embankment that has been removed in the southeast quarter of Section 34 and the northwest quarter of the southwest quarter of Section 35, T.21N., R.1E. (Exhibit A, item M). This embankment should be reconstructed along the previous alignment with a continuous top elevation of approximately 985.

(m) Raise, operate and maintain the two existing flow control structures at the ends of the reconstructed portion of unnamed reservoir embankment described in paragraph 4.1. above (Exhibit A, item N). One of these structures is located in the north-south ditch at the western end of the subject unnamed reservoir embankment, and passes through Bear Bluff Road. The other structure is located in the east-west ditch that approximately bisects Section 34 and 35, T.21N., R.1E., and passes through the unnamed reservoir embankment. These flow control structures should be raised, stabilized and operated, so as to maintain the normal high water level in the subject unnamed reservoir at approximately elevation 984.

(n) Operate and maintain the existing flow control structure (WPA Dam B-11) and a culvert with riser in the reservoir embankment located in the northeast quarter of Section 34 and the northwest corner of Section 35, T.21N., R.1E. (Exhibit A, item O), so as to maintain the normal level of this reservoir at approximately elevation 987.5.

(o) Operate and maintain the existing flow control structure in the north-south ditch at the junction of Bear Bluff Road and Bear Bluff Road South near the southeast corner of Section 34, T.21N., R.1E. (Exhibit A, item P). The retaining wall and riser on the upstream side of this structure should be repaired.

(p) Maintain a culvert (36 inch minimum diameter) through Bear Bluff Road North at the east-west ditch that bisects Section 35, T.21N., R.1E. (Exhibit A, item Q).

(q) Construct channel plugs in the four east-west ditches located in Section 36, T.21N., R.1E., near the junction of these ditches with the north-south ditch that bisects the same Section (Exhibit A, item R).

(r) Construct a channel plug in the east-west ditch at the northern boundary of Section 1, T.20N., R.1E., approximately 150 feet west of Cranberry Road (Exhibit A, item S).

(s) Remove the western extensions of the cranberry bog dikes located in the southeast quarter of Section 3, T.20N., R.1E. (Exhibit A, item T), so as to return this cranberry bog to the dimensions that existed at the time of the Court's order of June 5, 1978.

(t) The areas in Juleane Reservoir, unnamed reservoir and Section 34, which are plowed and not disced, should be disced. This will restore the area to approximate original contours and will allow wetland vegetation to establish in these areas.

(u) The dikes and embankments for the reservoirs should be constructed by scraping and bulldozing material from the reservoirs. The materials should be removed to the deepest depth near the embankments and dikes and be sloped into the reservoirs.

(v) The elevation indicated in subparagraphs 1(a) through (u) above are referenced to Public Service Commission benchmark tablets on Dams B-8 and B-11. The corresponding benchmark elevations are 975.62 and 988.25, respectively. These benchmarks should be utilized to establish and verify the elevations associated with the required restoration measures outlined in paragraph 1 above.

(w) The borrow material utilized for the required reservoir embankment reconstruction and construction of channel plugs and flow control structures should be the least permeable material available on site. This material should be adequately compacted to minimize seepage potential through these structures. Appropriate erosion control measures should be taken to stabilize these structures and maintenance performed as necessary. The reconstructed reservoir embankments should have a top width of approximately 15 feet and side slopes no steeper

than 1 vertical to 3 horizontal. The required channel plugs should be constructed to the elevation of the surrounding ground surface and should have a minimum top length of approximately 50 feet. The slopes at the ends of these plugs should be no steeper than 1 vertical to 5 horizontal.

2. Defendants are further required to complete this plan on or before December 31, 1983.

3. The defendants are also required to post a performance bond, payable to the United States of America, to guarantee their compliance with the restoration plan.

4. For one year after the restoration is completed, the plaintiff will monitor hydrologic and environmental conditions of the site. Should additional restoration work be required to achieve the desired hydrologic and environmental conditions, the plaintiff will propose to the defendant and the Court the necessary additions and/or modifications.

5. That for purposes of implementing the procedure described in subparagraph (v) above and monitoring compliance with paragraph 1 above, the St. Paul District Engineer or his designee shall be afforded reasonable access by the defendants to any and all portions of the area described in paragraph 1 above.

Entered this 4th day of November, 1983.

BY THE COURT:

Barbara B. Crabb

Judge Barbara B. Crabb
United States District Judge

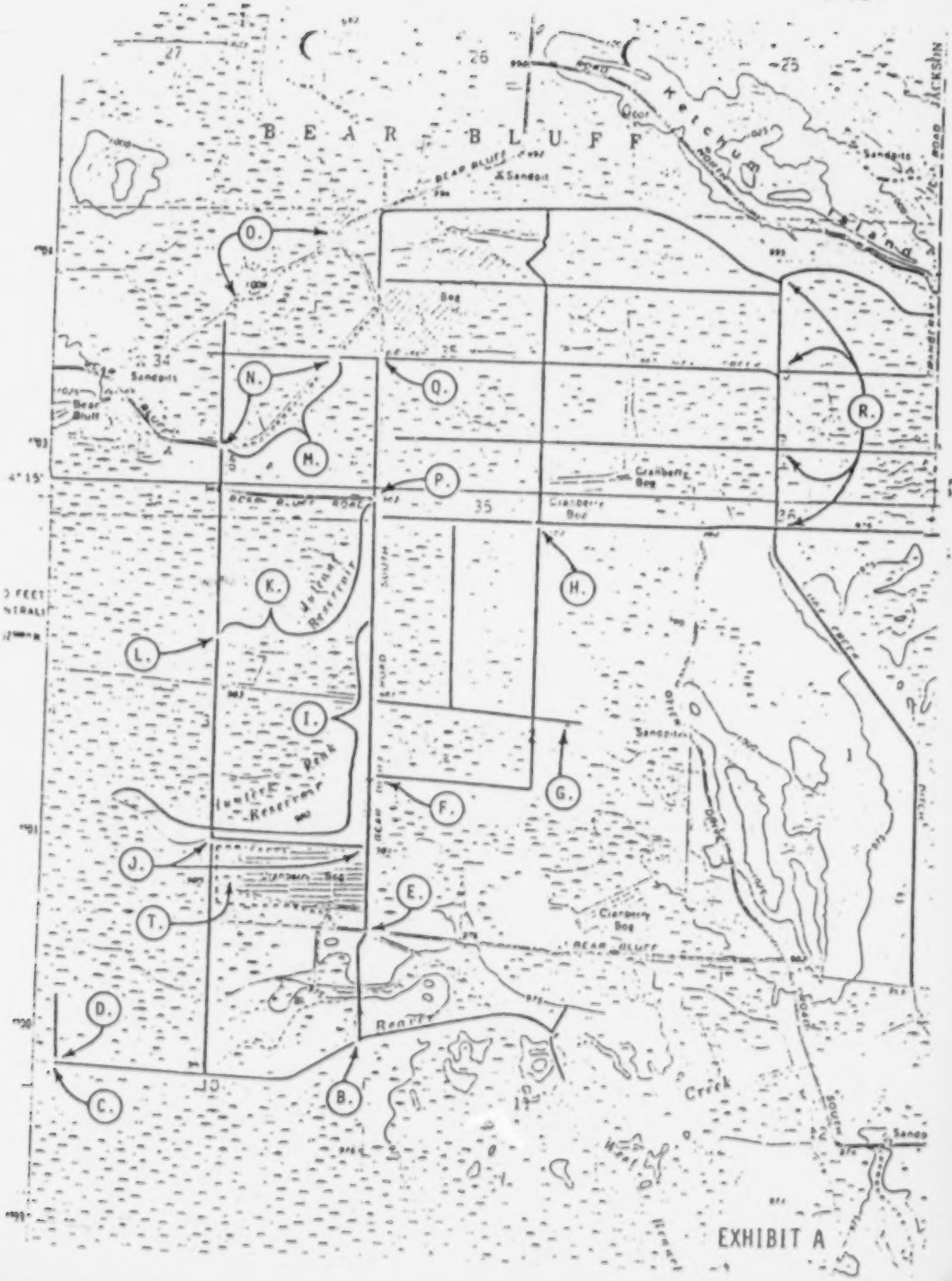
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EXHIBIT A

Appendix D

Judgment on Decision by the Court

In the United States District Court

For the Western District of Wisconsin

CIVIL ACTION FILE NO. 77-C-407-C

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROLAND G. HUEBNER,
WILLIAM HUEBNER, and
PETENWELL POTATO FARMS,
Defendants.

JUDGMENT

Docket No. 139
Filed Nov. 15, 1983

This action came on for hearing before the Court, Honorable Barbara B. Crabb, United States District Judge, presiding, and the issues having been duly heard and a decisoin having been duly rendered,

It is Ordered and Adjudged (See Order and Restoration Plan of November 4, 1983, for the terms and conditions of this judgment.)

Barbara B. Crabb

Judge Barbara B. Crabb
United States District Judge

APPROVED AS TO FORM:

Dated this 14th day of November, 1983

Dated at Madison, Wisconsin, this 15th day of November, 1983.

Joseph W. Skupniewitz
Clerk of Court